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No. 90-6704

In The

Supreme Court of the United States

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

DELAWARE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF FOR PETITIONER

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
(Counsel of Record)

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801
(302) 577-3230

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Did evidence of petitioner's constitutionally protected belief in the Aryan Brotherhood – a group identified as a "white racist prison gang" but not shown to have engaged in any unlawful activity (or indeed in any specific activity at all) – violate his First, Eighth and Fourteenth Amendment rights when such evidence was admitted as a non-statutory aggravating circumstance calling for a sentence of death in his prosecution for a murder that had no racial motivations or connections whatsoever?

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OPINION BELOW

The opinion of the Delaware Supreme Court at issue was filed on October 4, 1990, and is cited as *Dawson v. State,* 581 A.2d 1078 (Del. 1990). It appears in the joint appendix at A.135-209.

STATEMENT OF JURISDICTION

A petition for a writ of *certiorari* to review the October 4, 1990 judgment of the Supreme Court of Delaware which affirmed the petitioner's conviction and sentence of death, was filed on January 2, 1991.

The petition for writ of *certiorari* to the Supreme Court of Delaware was granted by the Court on April 1, 1991.

The Court's jurisdiction to review this matter is predicated upon 28 U.S.C. § 1257(a) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law.

Two Delaware statutes provide the background for the penalty hearing that gave rise to the issue presented in this case. The first is *Del. C. Ann.*, Title 11, § 636, which defines the offense of Murder in the First Degree. The second is *Del. C. Ann.*, Title 11, § 4209, which prescribes the punishment, the procedure for determining punishment and the method of punishment for the offense of Murder in the First Degree. That statute provides in pertinent part that:

(b)(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit or probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by trial judge before that jury as soon as practicable after the return of the verdict of guilty. . . .

(c)(1) . . . At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to

the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this subsection. . . .

(c)(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d)(1) A sentence of death shall not be imposed unless the jury or judge, where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed. . . . A finding by the jury of a statutory aggravating circumstance, and a consequent recommendation of death, supported by the evidence, shall be binding on the Court. . . .

(d)(3) If the jury, or judge when applicable, cannot unanimously find that at least 1

statutory aggravating circumstance exists and cannot unanimously recommend death, the Court shall sentence the defendant to life imprisonment without benefit of probation or parole.

STATEMENT OF THE CASE

On the morning of December 1, 1986, the petitioner, David Dawson, and three other prisoners escaped from the state correctional facility near Clayton, Delaware. (J.A.137) Later that afternoon, Madeline Kisner was found dead at her rural home near Clayton, Delaware, murdered during a burglary. (J.A.140-141) The petitioner was later arrested and charged with robbery, burglary, murder and weapons offenses as a result of the Kisner murder. Following a jury trial, Dawson was convicted on all counts related to the burglary and murder. (J.A.135)

Following these findings of guilt, the trial court conducted a penalty hearing pursuant to *Del. C. Ann.*, Title 11, § 4209. (J.A.135) The jury unanimously recommended the death sentence.[1] (J.A.135) As a consequence of this legally binding recommendation, *Del. C. Ann.*, Title 11, § 4209(d), Dawson was sentenced to death by lethal injection. To establish petitioner's eligibility for the death penalty, the State alleged and the jury found three statutory aggravating circumstances to have been established

[1] Four death sentences were actually imposed for a single murder because the defendant was indicted on and convicted of four counts of murder, each embodying a different statutory basis.

by the evidence introduced at the guilt phase of trial: 1) The murder was committed by an escapee from a place of confinement; 2) The murder was committed during the commission of a burglary or robbery; and, 3) The murder was committed for pecuniary gain.[2] *Dawson v. State*, 581 A.2d 1078, 1102 n.27 (Del. 1990). (J.A.189)

To persuade the sentencing jury to impose a sentence of death, the State of Delaware also relied on several non-statutory aggravating circumstances, three of which are relevant in this appeal: As noted by the trial judge in his post-trial report, these were that:

> 1. "D[awson] has associated himself with the Aryan Brotherhood, a white racist prison gang."
>
> 2. "D[awson] has taken the name "Abbaddon", which may be defined as the destroyer or angel of the bottomless pit or the like."
>
> 3. "D[awson] described himself as one of the Satan's disciples on the evening of the murder."[3]

Prior to trial the defense had objected to the introduction of any evidence concerning the defendant's alleged belief in or affiliation with the Aryan Brotherhood during the trial or penalty phase on the ground that Dawson's First Amendment rights of freedom of belief,

[2] Delaware law requires a finding of at least one aggravating circumstance as a condition precedent to a jury's recommendation of death. *Del. C. Ann.*, Title 11, § 4209(e)(1).

[3] ¶10 of Trial Judge's Report dated July 26, 1988. The State also cited as nonstatutory aggravating circumstances the allegation that the victim was defenseless, Dawson's adult and juvenile record, Dawson's extensive periods of incarceration and Dawson's correctional record. (R.2)

freedom of association, freedom of religion, and due process rights would be violated if the State were allowed to introduce such evidence. (J.A.2-3, 8-25) The defense had filed a motion *in limine* concerning this issue which was later argued on several occasions prior to trial and also prior to the commencement of the penalty hearing. (J.A.2-3, 8-25, 147-149, 183-184)

The prosecution took the position that evidence of Dawson's affiliation with the Aryan Brotherhood was admissible during Dawson's penalty hearing:

> If he advocates racial and religious bigotry and supports those himself, I think that definitely reflects on his character and his propensities and that is one of the things that is relevant to the jury. So it may or may not be relevant at the guilt phase depending on how the trial comes up, but it is very definitely relevant in the penalty phase.
>
> * * *
>
> I think the fact he may subscribe to very radical beliefs about blacks and Jews[4] is far more relevant to his character and propensities than a misdemeanor theft charge 10 years ago. . . .

(J.A.11, 17).

[4] Although the defendant's alleged racial prejudice was an issue at Dawson's trial, (A.14-17), the trial judge indicated that Dawson did not raise race as an issue at trial nor did race otherwise appear as an issue at trial in his capital sentencing report to the Delaware Supreme Court dated July 26, 1988. (A.133)

When asked by the trial court how the Aryan Brotherhood could be tied into the petitioner, the prosecution responded in part:

> Well, Your Honor, as I said, it wouldn't be tied in a specific sense. The State can't produce an expert who can tell us that David Dawson holds this particular belief or David Dawson acts upon this particular belief. What we seek to introduce is some understanding of what David Dawson ascribes to himself, the label Aryan Brotherhood . . .

(J.A.34-35). The prosecution later expanded on this point:

> In other words, we are looking at the character of this man, David Dawson, and not only things that he does. . . . What is important is for the jury to understand this is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in. He wears their tattoo. He wears their belt. He carries their literature, he paints his wall and so forth.

(J.A.37-38). According to the state prosecutors, some literature seized from the petitioner's prison cell "deals with kinds of white supremacy as religion." (J.A.36)

At the conclusion of the foregoing proffer by the prosecution, the trial court asked defense counsel: "Doesn't the joining of the Aryan Brotherhood provide at least some clue as to the character of the individual who would do that?" to which defense counsel responded:

> Yes. It provides some clue as to his character, but our position is that when it shows his character by indicating what his beliefs are, he would not be punished for his beliefs. If the jury

> is to impose a death penalty, they should base it on the crimes for which he has been convicted today, his crimes in the past, actions that he has done or failed to do. . . . *What one individual thinks in his or her mind should not be a ground used to find a fact to give to condem* [sic] *that person to death.*

(emphasis added). (J.A.41)

The State proffered no evidence that petitioner did anything unlawful in conjunction with his belief in the Aryan Brotherhood. The prosecutor asserted that petitioner's ideology alone without any associated illegal conduct was material to the issue of whether petitioner should be put to death:

> THE COURT: Other than perhaps painting his wall, has Mr. Dawson, in conjunction with his Aryan Brotherhood membership as it is purported to be, done anything unlawful while in prison?
>
> PROSECUTOR: Well, he may have, Your Honor. Nothing that we have caught him at.
>
> THE COURT: Anything that the State could offer?
>
> PROSECUTOR: No, Your Honor. . . . We don't think it is important that whether he acted or not acted on his membership in this group – what we think is important is that is the kind of thing he ascribes to. That is his character. He thinks that the Aryan Brotherhood is an organization that he wishes to align himself with.

(J.A.48-49)

The trial judge "ultimately concluded that the State could introduce evidence about the Aryan Brotherhood during the penalty phase of Dawson's trial." *Dawson v. State*, 581 A.2d at 1088 n.8. (J.A.152) In doing so, the trial court rejected the petitioner's contention that the First Amendment precluded the admission of evidence of his belief in the Aryan Brotherhood and ruled that the admissibility of such evidence would be determined during the penalty hearing at the time of its proffer by, "judg[ing] its probative value and any defense balancing as necessary under Rule 403 in the context of what proceedings are at the time in which the evidence is offered." (J.A.25)

Prior to the commencement of the penalty hearing, the parties stipulated that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

(J.A.132) In exchange, the State agreed not to call an expert witness to explain the nature and origin of the organization. (J.A.184)

The only evidence presented to the jury concerning Dawson's affiliation with the Aryan Brotherhood was a photograph of his hand bearing a tattoo showing the name Aryan Brotherhood and a one percent symbol in its center. (J.A.82-83) The prosecution introduced no evidence of either the nature of Dawson's affiliation with the Aryan Brotherhood or conduct which is ascribed to Dawson's affiliation with the Aryan Brotherhood.

Despite the absence of any evidence of misconduct by Dawson which could be ascribed to his affiliation with

the Aryan Brotherhood or any acts of misconduct by the Aryan Brotherhood in the Delaware Correctional Center [or anywhere else], the State emphasized the petitioner's belief in the Aryan Brotherhood as an aggravating factor supporting the death penalty. In his opening statement to the jury at the commencement of Dawson's penalty hearing, the prosecutor commented:

> You will hear evidence that the defendant is a member of the Aryan Brotherhood and the stipulation will include the fact that the Aryan Brotherhood is a racist, a white racist prison gang and, finally, you will hear evidence as to the defendant's own proclamation of his nickname Abaddon and we will find out in a few minutes what Abaddon means. Now, aside from those nonstatutory aggravating circumstances, that is the State's case.

(J.A.62) The prosecution again emphasized petitioner's affiliation with the Aryan Brotherhood in its summation at the conclusion of the penalty hearing:

> The character and propensities of the defendant. We introduced evidence to you ladies and gentlemen, about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.
>
> Could have joined the JC's in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan brother. What does that say about his character and propensities?
>
> . . . .

> Those are the nonstatutory aggravating circumstances, ladies and gentlemen. Those are other reasons why – those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.
>
> They also call out for the death penalty and what is the response to that?
>
> . . . .
>
> . . . Where is going to AA compare with proclaiming yourself an Aryan Brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?
>
> What does that tell you about the significance of those mitigating circumstances?. . . .
>
> Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan Brother David Dawson, is Abaddon?

(J.A.105-107) The prosecutor returned once more to this subject in rebuttal summation at the end of the penalty hearing:

> Second of all, what evidence is there that the defendant is going to think about anything except another tattoo? None. And he accuses the State of having introduced inflammatory terms in this case: The Aryan Brotherhood and Abbaddon. And he says well, if he has these thoughts, what's the harm?
>
> . . . If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's fine. . . .
>
> . . . .

> One of the cornerstones of American life is the freedom to make those choices. One of the corner stones of the American life is the responsibility for the choices you make. David Dawson was not forced to make the choices he made. . . . He wasn't forced to join the Aryan Brotherhood. He chose to do so.

(J.A.125, 129)[5]

Upon appeal, the Delaware Supreme Court affirmed Dawson's death penalty sentence, ruling that the evidence of Dawson's membership in the Aryan Brotherhood "was relevant to Dawson's character. Its admission did not violate Dawson's constitutional rights." *Dawson v. State*, 581 A.2d at 1103-1104. (J.A.192)

In finding no violation of Dawson's First Amendment rights, the Delaware Supreme Court neither analyzed nor discussed applicable First Amendment principles declared by this Court. Instead, the Delaware Supreme Court found that because the evidence of Dawson's membership in the Aryan Brotherhood "properly focused the jury's attention on Dawson's character . . . and did not shift the jury's attention away from

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[5] In addition, over the defendant's objection, the State was permitted to offer evidence that a tattoo containing the term "Abaddon" was located across petitioner's stomach area and that Webster's dictionary defines "Abaddon" as "one of Satan's disciples" or the "angel of the bottomless pit." (A.84-86, 183) The State also presented evidence that the petitioner introduced himself to someone he had met on the evening following the homicide as "Abaddon" and said that the name meant "one of Satan's disciples." (A.80-81)

the issue of Dawson's character," such evidence was admissible. *Id.* at 1103. (J.A.191-192)

SUMMARY OF THE ARGUMENT

The prosecutors asserted the petitioner's affiliation with a white racist prison organization as an aggravating circumstance in order to persuade the jury to return a death sentence. The trial court and the Delaware Supreme Court approved of this on the basis that Dawson's mere affiliation with the white racist ideology of the Aryan Brotherhood constituted admissible character evidence in a capital sentencing proceeding which could support imposition of a death sentence for the petitioner. However, because Delaware "attached the 'aggravating' label to factors that are constitutionally impermissible," due process requires that the petitioner's death sentence be vacated. *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

The only connection between the petitioner and the Aryan Brotherhood was manifested by a tattoo on his hand. Therefore, the petitioner's expressive behavior by wearing the group's tattoo constitutes the purest form of constitutionally protected activity, namely the mere affiliation with a group defined by its belief in a distasteful ideology.

Because both the petitioner and his murder victim were white, Dawson's interest in the Aryan Brotherhood was totally irrelevant to the question of whether or not he should be sentenced to death for the murder. *Barclay v. Florida*, 463 U.S. 939 (1983). Therefore, the prosecution's introduction of the issue at petitioner's penalty hearing

caused a constitutionally impermissible factor to intrude into the jury's capital sentencing decision.

The constitutional invalidity of the petitioner's death sentence is additionally confirmed by the absence of any legislative judgment articulating a principle by which such associational activity is to be evaluated as evidence of evil character deserving a sentence of death.

The due process clause of the Fourteenth Amendment forbids the execution of a defendant such as Dawson whose sentence of death was returned by the jury after the prosecution argued that the defendant's white racist beliefs provided a basis for imposing the sentence of death for a non-racially motivated murder. *Zant*, 462 U.S. at 885.

ARGUMENT

DAWSON'S SENTENCE OF DEATH IS INVALID BECAUSE THE STATE OF DELAWARE ASSERTED HIS CONSTITUTIONALLY PROTECTED BELIEFS AS AN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE OF DEATH.

This case presents a very narrow issue. Over Dawson's federal constitutional objections, the prosecutor at the penalty phase of his capital murder trial was permitted to present to the sentencing jury, as a reason for imposing a death sentence, evidence that "Dawson identified himself as a member of the prison gang known as the Aryan Brotherhood by having its name and logo tattooed on his body." *Dawson v. State*, 581 A.2d 1078,

1102 (1990). (J.A.188) The only information that the prosecutor offered concerning the Aryan Brotherhood was that it was a "white racist prison gang" originating in California in the 1960's which had given rise to like-named organizations "in many state prisons including Delaware." (J.A.132)

The prosecutor did not undertake to show that the Aryan Brotherhood, or whatever group went by that name in any Delaware prison, had committed any unlawful acts. He did not undertake to show that the Aryan Brotherhood had committed any acts at all, other than entertaining "white racist" beliefs and spreading from prison to prison. He did not show – and could not show, because it is not the case – that any Delaware prison authorities had forbidden inmates to belong to the Aryan Brotherhood. He did not show, and he explicitly disavowed the possession of any evidence which showed, that Dawson himself had ever engaged in any overt behavior (other than having himself tattooed and painting his cell wall) which supported whatever the Aryan Brotherhood was or did, (J.A.48-49), or which even revealed "that David Dawson holds this particular belief or David Dawson acts upon this particular belief." (J.A.34, 35)

The Delaware General Assembly has not specified that membership in the Aryan Brotherhood or any class of organizations including the Aryan Brotherhood was an aggravating circumstance in a murder case. The prosecutor neither showed nor suggested that Dawson's affiliation with the Aryan Brotherhood was connected in any was with the murder of Madeline Kisner. Both the petitioner and the murder victim were white. Rather, the

admission of the Aryan Brotherhood evidence in aggravation was based solely on the theory, as expressed by the trial judge and quoted by the Delaware Supreme Court, that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America can be probative of character, at least to some extent." *Dawson v. State*, 581 A.2d at 1100. (J.A.184)

Thus, the issue presented is whether the purest form of constitutionally protected associational activity – mere affiliation with a group defined by its belief in a distasteful ideology – can be used to support a death sentence for a murder to which it is wholly unrelated, in the absence of any legislative judgment articulating and limiting the principle by which such belief or associational activity is to be evaluated as evidence of evil character deserving a sentence of death.

The prosecutor's use of Dawson's affiliation with the Aryan Brotherhood as an aggravating circumstance in justification of the imposition of a death sentence penalized his exercise of constitutionally guaranteed rights to free belief and free association. Because the prosecutor was permitted to present evidence of Dawson's affiliation with the Aryan Brotherhood on the theory that his mere agreement with the organization's racist ideology was a reason for sentencing him to death, a constitutionally impermissible factor intruded into the capital sentencing decision in his case. *Zant v. Stephens*, 462 U.S. at 885 (1983).

Thus, in its Brief in Opposition, Delaware concedes that it could not have made "the possession of a particular belief or the exercise of other constitutionally

protected self-expressive activity a 'threshold' statutory aggravating circumstance." Br. In Opp., p. 24. Nonetheless, Delaware argues that no error has occurred because Dawson's affiliation became a factor only in the final and highly discretionary stage of the sentencing process when the decision of Dawson's jury to impose the death sentence could be influenced by his white racist beliefs: "[T]he traditional First Amendment constraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the 'reasoned moral response' whether 'an individual has lost his moral entitlement to live'." Br. In Opp. pp. 27-28.

Delaware, however, can offer no reasonable explanation for the unprecedented distinction it relies upon. Indeed, in *Zant*, it was only because Georgia had not attached the "aggravating" label to constitutionally protected belief or association, that evidence establishing the invalid statutory aggravating circumstance was found to be admissible at the penalty hearing, although the circumstance itself could not have served as a sufficiently valid statutory "channeling" factor to properly narrow the class of persons eligible for the sentence of death. *Id.* at 885.

Moreover, as this Court has recently observed:

> If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. 397, 414 (1989). That others are "profoundly opposed . . . is no proper basis for restricting speech or expression under the First Amendment." *Id.* at

432 (Rehnquist, C.J., dissenting). See also, *United States v. Eichman*, 496 U.S. ___, ___, 110 L.Ed.2d 287, 297, 110 S.Ct. 2404, 2410 (1990) (Stevens, J. dissenting). Among the rights also secured by the First and Fourteenth Amendments is the right to freedom of association. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The right to freedom of association includes the right to affiliate with whatever group(s) one chooses without fear of criminal repercussion. *Healy v. James*, 408 U.S. 169, 185-86 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *DeJonge v. Oregon*, 299 U.S. 353 (1937). It "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Also within the rights secured by the First and Fourteenth Amendments is the right to freedom of thought which "extend[s] to all irrespective of their race or ideology." *Id.* at 482-83. This right to freedom of thought includes the right to choose one's own ideology free from any threat of criminal sanction. *Brandenburg v. Ohio*, 395 U.S. at 456 (Douglas, J., concurring) ("One's beliefs have long been thought to be sanctuaries which the government could not invade."). In *Brandenburg*, this Court held that the First Amendment removes from the sphere of criminal prosecution the remarks of a white racist leader of a Ku Klux Klan group who speaks at a cross-burning and utters phrases such as "Bury the niggers," "the niggers should be returned to Africa," and "send the Jews back to Israel." *Id.* at 446.

A sentence based to any degree on beliefs protected by the First Amendment is constitutionally invalid. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983)

(defendant a member of the "Black Hebrews"). Another court has also recently observed:

> Sentencing discretion, however, must be exercised within the boundaries of due process . . . Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process . . . While these cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes on his own religious characteristics into account in sentencing. (citations omitted).

United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

The prosecution below insisted that it was the petitioner's acceptance of the ideology of the Aryan Brotherhood without any associated illegal conduct which was material to the issue of whether Dawson should be put to death. (J.A.48-49)[6] Under the prosecution's view, Dawson's affiliation showed his character because "his character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in." (J.A.38)[7]

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[6] However, our system of justice has never recognized this Orwellian concept of "thoughtcrime." Rather, "A man may have as bad a heart as he chooses, if his conduct is within the rules." Oliver Wendell Holmes, *The Common Law*, 110 (1881).

[7] The prosecution could not attribute any illegal conduct to the Delaware Aryan Brotherhood which the prosecution stipulated was a distinct and separate group from the prison gang bearing the same name. (J.A.46)

The claim by Delaware's prosecutors that evidence of Dawson's affiliation with the Delaware Aryan Brotherhood was relevant to justify his death is also unsupported by any findings about the Delaware Aryan Brotherhood by state prison administrators who evidently found it unnecessary to regulate any facet of an inmate's affiliation with the Aryan Brotherhood. Moreover, there has never been any contention that Dawson's affiliation with the Delaware Aryan Brotherhood was illegal or contrary to any rule or regulation of Delaware's prison system, other than perhaps painting his wall with ideological symbols. Accordingly, Dawson's incarceration itself entailed no applicable limitation upon his rights to affiliate himself with the Aryan Brotherhood and to embrace its white racist ideology. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). In *Jones*, prison officials distinguished between union membership, which was permitted, and union activities, seeking only to regulate that union activity which they reasonably believed would interfere with the orderly administration of the prison system.

Even if any activities incident to affiliation with the Aryan Brotherhood had been prohibited under prison regulations, the prosecution's attempt to impute its illegal goals to Dawson was constitutionally invalid. This Court has taken the occasion to caution lower courts that: "A number of complex motivations may impel an individual to align himself with a particular organization. (citation omitted). It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal

goals." *United States v. Robel*, 389 U.S. 258, 266 n.16 (1967). Even when an organization is shown to embrace illegal as well as legal aims – as was not shown of the Aryan Brotherhood here – an individual cannot constitutionally be penalized for membership without proof that he or she was aware of the illegal aims and intended to promote them. See, e.g., *Yates v. United States*, 354 U.S. 298, 331 (1957).

> [T]his element of [a] . . . membership crime . . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other unprotected purposes which he does not necessarily share.
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> *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

The Delaware Supreme Court ignored these basic precepts when if found: "Dawson's affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others, but again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." *Dawson*, 581 A.2d at 1102. (J.A.188) The finding that Dawson's affiliation with the Delaware Aryan Brotherhood was "characteristic of his lawless nature and rejection of rehabilitation during his incarceration," (J.A.188), is not only legally incorrect but has no basis in fact. The entirety of the evidence offered to establish the nature and extent of Dawson's affiliation with the Aryan Brotherhood was

that he wore an alleged Aryan Brotherhood tattoo and the stipulation that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

(J.A.132)

It is fundamental that before any criminal sanction may lawfully be imposed for one's affiliation or association with an organization, the government must discharge: "[its] burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy v. James*, 408 U.S. at 186; *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961). There was certainly no such showing in Dawson's case.

By justifying the jury's consideration of evidence of Dawson's membership in the Aryan Brotherhood as evidence of character which was relevant to the jury's determination of whether he should be executed, the prosecution and the Delaware Supreme Court ignored this Court's command that a state cannot avoid respecting the exercise of First Amendment rights "by mere labels." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964); *N.A.A.C.P. v. Button*, 372 U.S. 415, 429 (1963).[8]

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[8] Even where evidence of a defendant's constitutionally protected affiliation is introduced, not to punish him but for an

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The only constitutionally legitimate basis for utilizing Dawson's white racist beliefs and affiliation with the Aryan Brotherhood would have been if the murder was racially motivated as a result of these beliefs. *Barclay v. Florida*, 463 U.S. 939 (1983). However, both Dawson and Kisner were white and the State has conceded that the murder was not racially motivated. Therefore, the prosecution should not have been permitted to assert Dawson's white racist beliefs as supporting a sentence of death under the guise that his ideology constituted admissible character evidence.

Our beliefs may shed light on our character in all sorts of ways whether we believe in Allah or the Pope, the NAACP or the KKK, an organized religion or atheism, the Black Hebrews or the Aryan Brotherhood. However, our constitution protects us from being punished by the government for our beliefs regardless of what those beliefs may indicate about our character. Under our constitutional scheme, the exercise of governmental power is subject to certain basic rights enjoyed by citizens – no matter how offensive the majority might find the beliefs protected by the existence of such rights to be.

If this Court were to sanction the use of political beliefs and associations as aggravating factors supporting the imposition of the death penalty, what limiting principle, if any, could be devised to ensure its even-handed

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otherwise recognized and proper limited purpose, any irrelevant reference to the defendant's ideological belief or affiliation should be sanitized in the evidence presented to the jury. *United States v. Abel*, 469 U.S. 45, 48 (1984).

application? Who would decide which First Amendment beliefs or associations would be protected and which would be grist for the death sentencing mill?

If Delaware officials were to decide this, by what standards would they balance countervailing First Amendment protected values against each other? Were Delaware race neutral in its death policy, would it not also insist that membership in the "Black Hebrews", "Black Muslims", "Mexican Mafia" or other prison ethnic or racial sects would similarly constitute "character" evidence probative in a death penalty proceeding of whether that individual should die? Cf. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983). Would Delaware likewise contend that anyone who voted for, worked for or merely sympathized with either State Representative David Duke of Louisiana or Reverend Louis Farrakhan is more deserving of the death penalty than he or she would otherwise have been? Where in such line-drawing would Delaware place any person who had voted for, worked for or merely believed in George Wallace's presidential candidacy? What of a Muslim who hoped for, prayed for, or lobbied for a triumph by Saddam Hussein in the recent Persian Gulf War? What of a person who had burned an American flag in political protest? *Texas v. Johnson*, 491 U.S. 397 (1989). Where would former officials whose reluctance to enforce racial integration denied black students equal protection of the law stand?[9]

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[9] Delaware's present avoidance of race neutrality may be viewed in an ironic historical context. Nearly forty years ago,

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Dawson's affiliation with the Aryan Brotherhood was an exercise of his right to freedom of belief and association and not a legitimate reason to tilt the balance of the jury's discretion towards a sentence of death. His racist views – certainly unpalatable to the majority of this country's citizens – are nothing more and nothing less than a manifestation of his right to believe as he chooses without governmental intrusion: "The result we have reached is dictated by the fundamental proposition that if [First Amendment] rights are to remain vital for all, they must protect, not only those whom society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). If the government cannot fine or imprison the petitioner as a result of such belief, or deny him employment or a passport as a result of such belief, then the government can no more remove him from the census roles and seek his death as a result of his holding such beliefs. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

Dawson's death sentence is constitutionally infirm because the jury was permitted at the sentencing stage "to draw adverse inferences from conduct that is constitutionally protected." *Zant*, 462 U.S. at 885. Because Delaware has "attached the 'aggravating' label to factors that

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Delaware asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" unequal school districts. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), modified *sub. nom., Brown v. Board of Education*, 347 U.S. 483 (1954).

are constitutionally impermissible", due process requires that Dawson's sentence of death be vacated. *Id.* See also *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985).

CONCLUSION

Based upon the foregoing argument and authorities, the Petitioner's sentences of death should be vacated.

Respectfully submitted,

LAWRENCE M. SULLIVAN
Public Defender of the
State of Delaware

BERNARD J. O'DONNELL
Assistant Public Defender
(Counsel of Record)

BRIAN J. BARTLEY
Assistant Public Defender

Office of Public Defender
820 North French Street
Wilmington, Delaware 19801

Attorneys for Petitioner